THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

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May 20, 1971

Honorable Ralph M. Hall
The Senate of Texas
Senate Chambers
Capitol Station
Austin, Texas

Opinion No. M-865

Re: Constitutionality of S.B. 925, 62nd Legislature, Regular Session, 1971, relating to the status of an area annexed to a wet justice precinct in certain counties.

Dear Senator Hall:

You have submitted for our consideration the constitutionality of Senate Bill 925, 62nd Legislature, Regular Session 1971, same being a proposed amendment to Section 23, Article I of the Texas Liquor Control Act, codified as Article 666-23, Vernon's Penal Code, the pertinent portion of which as originally introduced, reads as follows:

> "Provided, however, that whenever the Commissioners' Court of any county in the state of over 350,000 population according to the last federal census shall annex areas to any justice precinct designated as a 'wet area', the annexed portion shall become wet if its prior status was that of a 'dry area', and such order of the Commissioners' Court attaching such portion of a dry justice precinct to a wet justice precinct will not serve to prohibit the sale of alcoholic beverages in the attached portion."

Article 16, Section 20, Subsection (b) and (c) of the Texas Constitution adopted in 1935 specifically repealed State wide prohibition and granted authority to the Legislature to return the State to a system of local option regulation, in the following language:

> "(b) The Legislature shall enact a law or laws whereby the qualified voters of any county, justice's

> precinct or incorporated town or city, may, by a majority vote of those voting, determine from time to time whether the sale of intoxicating liquors for beverage purposes shall be prohibited or legalized within the prescribed limits; and such laws shall contain provisions for voting on the sale of intoxicating liquors of various types and various alcoholic content.
>
> "(c) In all counties, justice's precincts or incorporated towns or cities wherein the sale of intoxicating liquors had been prohibited by local option elections held under the laws of the State of Texas and in force at the time of the taking effect of Section 20, Article XVI of the Constitution of Texas, it shall continue to be unlawful to manufacture, sell, barter or exchange in any such county, justice's precinct or incorporated town or city, any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication or any other intoxicants whatsoever, for beverage purposes, unless and until a majority of the qualified voters in such county or political subdivision thereof voting in an election held for such purpose shall determine such to be lawful; provided that this subsection shall not prohibit the sale of alcoholic beverages containing not more than 3.2 per cent alcohol by weight in cities, counties or political subdivisions thereof in which the qualified voters have voted to legalize such sale under the provisions of Chapter 116, Acts of the Regular Session of the 43rd Legislature."

Pursuant to this constitutional mandate the Legislature passed the Texas Liquor Control Act regulating the sale of intoxicating beverages and providing for the holding of local option elections. These provisions pertaining to elections are codified as Article 666-32, et. seq., Vernon's Penal Code.

The term "local option" is well understood by the Legislature and the voters of Texas. A local option election is a clear, valid declaration of the will of the voters, which under the Constitution and statutes they have a right to authoritatively establish. The Supreme Court in Houchins v. Plainos, 130 Tex. 413, 110 S.W.2d 549 (1937), ruled that

the Constitution provides the exclusive means by which the issue of prohibition or legalization of alcoholic beverages could be decided. That Court in the earlier case, State v. Texas Brewing Company, 106 Tex. 121, 157 S.W. 1166 (1913) at page 125 reached a similar conclusion when it stated:

> "All powers of government reside in the people, and the officials of the different departments exercise delegated authority; however, the Legislature can exercise all legislative power not prohibited by the Constitution. But the section of the Constitution quoted provides a method (a referendum) by which the voters of a given territory may exercise the sovereign power of legislating upon this subject, which places the law adopted by them above legislative authority, as if it had been embraced in the Constitution, and we must so consider the local option law adopted by the voters of Clay County, for that, like the Constitution, is the exercise of primary sovereignty; therefore, what is prohibited by the local option law to be done in Clay County, as to sale of intoxicating liquors, cannot be authorized by the Legislature to be done there." (at p. 125).

Therefore, as held in Medford v. State, 74 S.W. 768, 45 Tex.Crim. 80 (1903),

> "Where local option has been legally put into operation within a specified territory, it must remain in force in that territory; that no power - Legislative or Judicial has the authority to change the boundaries of a local option territory so as to render inoperative the law as put into operation during its pendency in that territory. The same authority that put it into operation must annul, . . ."

In line with this reasoning, numerous Texas cases have held that not withstanding the fact the Commissioners' Court has the clear legal right to define, redefine, change or alter the boundaries of precincts within the county, that it is beyond the power of the Commissioners' Court to so change the boundaries of a justice precinct as to repeal a law passed by a local option election in favor or against

prohibition. Bullington v. Lear, 230 S.W.2d 290 (Tex.Civ.App. 1950, no writ); Goodie Goodie Sandwich, Inc. v. State, 138 S.W.2d 906 (Tex.Civ.App. 1940, error dism., judg. cor.); Houchins v. Plainos, supra; Jackson v. State, 118 S.W.2d 313 (Tex.Civ.App. 1938, no writ). In accord, Attorney General Opinion Nos. C-658 (1966), C-681 (1966), and 0-6880 (1945).

It was further held in Attorney General Opinion No. WW-1149 (1961) that when one justice precinct is wet and a portion of a dry precinct is merged with it, and even though that part of the dry precinct merged with the wet precinct has no residents, the portion of the dry precinct merged with wet precinct remains dry.

Senate Bill 925 prescribes in certain counties another means for legislation of alcoholic beverages in a constitutionally established dry area, other than by local option, as required by the Constitution.

It is our opinion that Senate Bill 925 violates the constitutional mandate for local option and therefore is unconstitutional. To hold otherwise would have the effect of taking the local option power prescribed by the Constitution away from the voter in the locality and lodge it with the Commissioners' Court, who would be empowered to repeal local options in portions of the justice precinct by simply changing the boundaries of said precincts. Such an effect is not in harmony with the Constitution and the laws of this State, as interpreted by the Supreme Court, and other courts of our State, in the cases and Attorney General Opinions cited above.

S U M M A R Y

Senate Bill 925, 62nd Legislature, Regular Session, 1971, a proposed amendment to Section 23, Article I of the Texas Liquor Control Act, codified as Article 666-23, Vernon's Penal Code, providing that, in certain counties, an annexed "dry area" to a "wet area" shall occupy the same "wet" status as the annexing area violates the constitutional mandate of local option and is therefore unconstitutional.

Very truly yours,

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